Supreme Court, U.S.
FILED
DEC 1 2003
OFFICE OF THE CLERK

No. 03-654

In the
Supreme Court of the United States
October Term, 2003

Derrick Ramon Dukes,
Petitioner,
vs.
State of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A post conviction court found that Petitioner was not denied effective assistance of counsel when counsel made statements in final argument that might be construed as concessions to some elements. More than seven years after they affirmed the conviction on direct appeal, the Minnesota Supreme Court, applying Strickland v. Washington, affirmed the denial of post conviction relief. Should this Court review state court determinations that Petitioner had effective assistance of counsel?

TABLE OF CONTENTS

Table of Authorities ii

Question Presented 1

Opinions Below 2

Jurisdiction 4

Statement of the Case 5

Reasons for Denying the Petition 9

Conclusion 16

TABLE OF AUTHORITIES

STATE STATUTES

Minn. Stat. 590.04 15

Minn. Stat. 609.05 5

Minn. Stat. 609.185 5

FEDERAL STATUTES

Title 28 U.S.C. § 1257 4

STATE CASES

Dukes v. State, 621 N.W.2d 246 (Minn. 2001) 2, 7, 11, 12

Dukes v. State, 660 N.W.2d 804 (Minn. 2003) 3, 7

State v. Dukes, 544 N.W.2d 13 (Minn. 1996) 2, 6

State v. Wiplinger, 343 N.W.2d 858 (Minn. 1984) 11

FEDERAL CASES

Bell v. Cone, 535 U.S. 685 (2002) 13

Strickland v. Washington, 466 U.S. 668 (1984) 1, 9, 13, 14

OPINIONS BELOW

1. State v. Dukes, 544 N.W.2d 13 (Minn. 1996) (Dukes I). The Minnesota Supreme Court affirmed Petitioner's conviction for First Degree Murder on direct appeal. Petitioner does not reproduce this decision in his Appendix.
2. Dukes v. State, 621 N.W.2d 246 (Minn. 2001) (Dukes II). The Minnesota Supreme Court remanded the matter for additional fact-finding on a claim for post conviction relief. This decision is reproduced in Petitioner's Appendix at pages A-36 to A-58.
3. Post conviction court FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING RELIEF dated February 7, 2002, with attached MEMORANDUM is reproduced in Petitioner's Appendix at pages A-59 to A-68.

4. Dukes v. State, 660 N.W.2d 804 (Minn. 2003) (Dukes III). The Minnesota Supreme Court affirmed the denial of post conviction relief. This decision, including the dissenting opinion and the Order denying a petition for rehearing is reproduced in Petitioner's Appendix at pages A-1 to A-35. Petitioner seeks review of this decision.

JURISDICTION

This Court has jurisdiction to review final decisions of the highest-level state court when there is a federal question presented. Title 28 U.S.C. § 1257. Petitioner claims that he was denied his right to the effective assistance of counsel at trial guaranteed by the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A jury found Petitioner Derrick Ramon Dukes guilty of aiding and abetting First Degree Murder in violation of Minnesota Statutes § 609.185(a)(3) and § 609.05, subd. 1.

The murder occurred on April 1, 1994, when Petitioner drove Kevin Lewis and Steven Morrison in Petitioner's car from Minneapolis to St. Paul. They attempted to rob Bennie Chaney, but he ran away from the car and they only fired a weapon after him. Petitioner drove part-way around the block and stopped by a car occupied by Joe McKinney. They demanded money from McKinney, but shot and killed him and fled without obtaining any money. Bennie Chaney identified petitioner as one of the robbers; another witness identified Petitioner's car license number; and the police found the murder weapon in Petitioner's coat. (These facts are taken from the Minnesota Supreme

Court decision reported at State v. Dukes, 544 N.W.2d 13 (Minn. 1996) (Dukes I).)

Petitioner did not object to his trial lawyer's final argument at trial. Neither the trial judge nor the prosecutors made any record concerning it. Neither Petitioner nor his appellate counsel complained about the propriety of the final argument in the direct appeal to the Minnesota Supreme Court. The Minnesota Supreme Court affirmed the conviction on appeal and did not address the propriety of counsel's final argument.

Petitioner did not seek review by this Court of the decision affirming his conviction and did not seek Habeas Corpus relief in federal court for any claimed violation of Federal law.

In September 1999, in a Petition for Post Conviction Relief allowed under Minnesota Law, Petitioner for the first time complained that he had been denied the effective assistance of counsel at

trial because counsel in his final argument had conceded Petitioner's guilt. (*See* Dukes III, Dukes v. State, 660 N.W.2d 804 (Minn. 2003), in Petitioner's Appendix, at A-1 to A-34, page A-6.) The post conviction judge, the same District Court judge who presided over the trial, denied the request for relief.

The Minnesota Supreme Court, reviewing the denial of post conviction relief, remanded the case for additional fact-finding concerning the claim that counsel conceded guilt without Petitioner's specific agreement or acquiescence. (*See* Dukes v. State, 621 N.W.2d 246 (Minn. 2001) (Dukes II), in Petitioner's Appendix at A-36 to A-58.)

The same District Court judge again denied post conviction relief. (*See* FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING RELIEF dated February 7, 2002, in

Petitioner's Appendix at A-59 to A-68.) The judge found as a Fact that

> 9. The statements in the final argument, considered in the totality of the circumstances and [sic] were not necessarily concessions of Petitioner's guilt as to any element.

Id., at page A-61. The judge concluded as a matter of law that Petitioner was "not denied the effective assistance of counsel at trial." Id. CONCLUSION OF LAW # 3, at page A-62.

Petitioner seeks review of the decision of the Minnesota Supreme Court that affirmed the findings and conclusions of the post conviction court that Petitioner had not been denied the effective assistance of counsel at trial.

REASONS FOR DENYING THE PETITION

Petitioner seeks review so that this Court may reverse factual and legal conclusions of state courts that applied the proper standard to the Federal question presented. Petitioner concedes, as he must, that the Minnesota courts reviewed trial counsel's final argument in light of Strickland v. Washington, 466 U.S. 668 (1984). The Minnesota courts found that Petitioner was not denied the effective assistance of counsel at trial.

Judicial scrutiny of the performance of trial counsel is to be "highly deferential....[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689.

Petitioner claims that the Minnesota courts were too deferential to trial counsel. He claims that the conclusion that he had effective assistance of counsel at trial is incorrect as a matter of Constitutional law.

The ultimate question presented under Strickland is whether counsel's performance was so deficient that the conviction resulted in "a breakdown in the adversary process that rendered the result of the proceeding unreliable." Id. at 696. No question was raised at trial or in the direct appeal from conviction concerning trial counsel's final argument. Petitioner did not raise any objection to the final argument at trial and neither the trial judge nor the prosecutors made any record of any concern that the final argument was deficient in any respect. Neither Petitioner nor his appellate attorney raised any question about trial counsel's final argument on direct appeal, and the Minnesota Supreme Court

affirmed the conviction without addressing the propriety of the final argument at all.

It was only years later, with yet another attorney, that Petitioner made any claim that his trial lawyer's final argument was improper. The trial judge, who also considered the post conviction claim, denied post conviction relief. The Minnesota Supreme Court, however, remanded the case for additional fact-finding to determine whether there were any statements that "could be interpreted as conceding Dukes' guilt to [a lesser included offense]." Dukes v. State, 621 N.W.2d 246, 255 (Minn. 2001) (Dukes II).

The remand decision resulted from the application of state court precedent, the decision of the Minnesota Supreme Court in State v. Wiplinger, 343 N.W.2d 858 (Minn. 1984). That case involved a claim that the defendant received ineffective assistance of counsel at trial because his counsel

asked questions that might be construed as conceding the guilt of the defendant. Even though the defendant in Wiplinger objected to the questions during trial and was given a new lawyer, he was convicted of the charges. On appeal, the Minnesota Supreme Court reversed the conviction and held that they would establish a per se rule of automatic reversal in cases where a defense attorney conceded the guilt of the defendant without the agreement of the defendant.

In Petitioner's case, the Minnesota Supreme Court held that certain claims of ineffective assistance of counsel did not require a showing of prejudice, because prejudice will be presumed. Dukes v. State, 621 N.W.2d 246, 254 (Minn. 2001) (Dukes II). When evaluating ineffective assistance of counsel claims, however, this Court requires the defendant to prove that he was prejudiced by counsel's performance, not merely that counsel did

or failed to do a particular act. Bell v. Cone, 535 U.S. 685, 697 (2002).

Wiplinger's claim was based on the right to counsel under the Sixth Amendment to the United States Constitution. The Minnesota Supreme Court decision was released in May 1984, only months before this Court's decision in Strickland v. Washington, supra. This Court held that a court considering a claim of ineffective assistance of counsel must consider the totality of the circumstances and must not rely on mechanical rules. Strickland, supra, at 696. The Minnesota Supreme Court decision, on the other hand, established a mechanical rule.

But even though the Minnesota Supreme Court relied on their decision in Wiplinger to remand Petitioner's case for further consideration, the trial court considered the claim by examining the totality of the circumstances as required by this

Court's decision in Strickland v. Washington before concluding that Petitioner was not denied the effective assistance of counsel at trial. The Minnesota Supreme Court also correctly followed the approach required by Strickland when they again considered the case on appeal after the trial court again denied the claim.

The Minnesota Supreme Court considered trial counsel's final argument in light of the totality of the circumstances and concluded that the result of the proceeding was fair and that Petitioner's trial reached a just result.

Petitioner complains that the trial court and the Minnesota Supreme Court erred because they did not give adequate attention to the testimony of a defense lawyer called by Petitioner to be an expert witness on final arguments. It is, of course, the function of the trial court to make credibility determinations and to give testimony the weight that

the court deems is appropriate. Minnesota Statutes § 590.04, subd. 3. The trial court did not see fit to refer to the witness' testimony in its findings and conclusions denying relief. It would be inappropriate for this court to make a finding of fact that the witness' testimony should have been given greater weight.

CONCLUSION

Petitioner Derrick Dukes sought a new trial because his trial counsel made statements in his final argument that in hindsight might be construed as concessions of guilt. The Minnesota courts found that the statements of the trial counsel were not outside a wide range of reasonable professional assistance, and that Petitioner was not denied the effective assistance of counsel at trial. Petitioner asks this Court to reverse those determinations. He admits that the state courts applied the correct standard to the determination of the Federal question presented, but claims that they went too far in giving deference to his trial counsel's performance. Petitioner's claim is essentially that the state courts drew an improper legal conclusion because they did not make accurate findings of fact. This Court should not grant review to consider factual determinations made under the correct standard of

law. Respondent State of Minnesota asks that the Petition for a writ of certiorari be denied.

Dated: 1 Dec. 2003

Respectfully submitted;

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